No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE RUBEROID CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Miscellaneous:

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The Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above-entitled case on September 5, 1951.

OPINION BELOW

The opinion of the court of appeals (R. 153) is reported at 189 F. 2d 893. The opinion on rehearing (R. 176) is reported at 191 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1951 (R. 181-182). The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254 (1).

QUESTION PRESENTED

Whether, in a suit under Section 11 of the Clayton Act to set aside an order issued by the Federal Trade Commission under Section 2 of the Act, the court, having upheld the validity of the Commission's order, was thereupon bound to give it effect by commanding obedience thereto, or whether, as the court below held, it was incumbent upon the Commission to show affirmatively that the party attacking the order had failed to comply with it.

STATUTE INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended by Public Law 899, 81st Cong., 2d Sess., 15 U.S.C., Supp. IV, 21, provides in part:

* * * * *

> If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the plead-

ings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition

praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. * * *

* * * * *

STATEMENT

On July 26, 1943, the Federal Trade Commission issued a complaint against respondent pursuant to Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13. The complaint charged unlawful price discrimination by respondent in its interstate sales of certain roofing and insulating material, and that the effect of the price discrimination had been, or might be, sub-

stantially to lessen competition among purchasers from respondent (R. 2-6). Respondent's answer admitted that many of its customers were in competition with each other, and that it granted wholesalers a greater discount than that granted retailers and "applicators" [1] (R. 9-10). But it denied that it discriminated and that its practices were or might be injurious to competition, and it affirmatively pleaded that its price differentials were justified by cost factors, or were made in good faith to meet competition (R. 10).

After hearings before a trial examiner (R. 11-94), the filing of the examiner's recommended decision (R. 95), and exceptions thereto (R. 129), the matter was presented to the Commission on briefs and oral argument. The Commission made its findings of fact (R. 144-149), concluded that respondent's practices were unlawful (R. 150), and issued an order directing it to cease and desist from discriminating in price—

> By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products. [R. 151-152.]

Respondent thereafter filed in the court below a petition to set aside or to modify the order (R. 153). It did not deny that the Commission's find-

[1] "Applicators" refers to roofing contractors who applied Ruberoid products on contract jobs for which they were paid as a whole (R. 154).

ings were supported by evidence and it did not seriously contest issuance of some form of order against it, but contended that the order was too broad and that it should accordingly be set aside or, alternatively, reframed so as to include certain exemptions and provisos (R. 154-155). Overruling these contentions, the court unanimously held that the order was within the Commission's authority and that the order "must therefore stand, for appropriate enforcement" (R. 155-157). The final line of the court's opinion reads: "Order affirmed; enforcement granted" (R. 157).

Respondent filed a timely petition for rehearing, directed solely to the question of enforcement (R. 158), urging that a party affected by a cease and desist order may challenge its validity or scope by petitioning for review "without subjecting itself to a court injunction" (R. 159). The court held that if the Commission had initiated the judicial proceedings by applying for enforcement, it would have been obliged to show non-compliance with the order, and that there is no convincing reason why the Commission should not be "required to make the same showing" of a need for enforcement in a proceeding brought by the private party to set aside the order. (R. 177). The court also said that there was "uncontradicted evidence" that the practice against which the Commission's order was directed "has been abandoned" (*ibid.*).

Judge Clark, dissenting, stated that the cases

have consistently ruled "that two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished" (R. 178); that "in view of this number and weight of authority, petitioner had indeed hardihood to raise the issue" (R. 179); and that the court's holding would "tie up commission practice with merely repetitious hearings" (*ibid.*), tending "to fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one" (R. 177).

SPECIFICATIONS OF ERRORS TO BE URGED

The court of appeals erred—

(1) In failing to grant enforcement of the order which it duly affirmed.

(2) In holding that the Commission was not entitled to enforcement of the order in the absence of a showing of non-compliance.

(3) In concluding that there was evidence of abandonment of the illegal practices prohibited by the order.

REASONS FOR GRANTING THE WRIT

1. A Commission order issued under authority of the Clayton Act is "only informative and advisory" until there is impressed upon it the seal of judicial authority. *Federal Trade Commission v. Gratz*, 253 U.S. 421, 432. Congress provided that the circuit courts of appeals should act as courts of first instance in respect of Commission orders, a provision designed to assure "the speedi-

est settlement of disputed questions."[2] Under the statute, the Commission's orders come before courts of appeals in one of two ways, (1) on an application for enforcement filed by the Commission or (2) on a petition to review filed by the private party affected. The jurisdictional prerequisites of the two proceedings are not, however, precisely the same.

The paragraph of Section 11 relating to applications by the Commission to the court begins with the words: "If such person [the private party directed to cease and desist] fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals * * * *for the enforcement of its order* * * *." The paragraph, after providing for the filing of the administrative record, goes on to declare that the court shall have power to enter a decree "affirming, modifying, or setting aside" the order of the Commission. (See *supra*, pp. 2-3.)

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[2] The quoted language appears in the Conference Report on the Federal Trade Commission Act, H. Rep. No. 1142, 63rd Cong., 2nd Sess., p. 19. The enforcement provisions of Section 5 of the original Federal Trade Commission Act (38 Stat. 719) are virtually identical with those of the Clayton Act, and the two statutes were enacted and approved within a few weeks of one another.

Further evidence that the Congress intended to make Commission procedures prompt and effective is found in the fact that both Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act (*supra*, p. 4) provided that "proceedings in the United States Court of Appeals shall be given precedence over cases pending therein, and shall be in every way expedited."

The succeeding paragraph of Section 11 relating to petitions to review (*supra*, pp. 3-4) contains no "if" clause. Under its language compliance or non-compliance with the Commission's order is wholly immaterial. It provides: "Any party" against whom the Commission has entered an order "may obtain a review" thereof by filing with the court a petition for review. This petition is to be served upon the Commission, which shall thereupon file with the court a transcript of the administrative record. It is provided that, upon the filing of this transcript, the court shall have "the same jurisdiction to affirm, set aside, or modify" the order of the Commission "as in the case of an application by the Commission or Board for the *enforcement* of its order." The paragraph which immediately follows reads (*supra*, p. 4):

> The jurisdiction of the United States court of appeals to *enforce*, set aside, or modify orders of the Commission or Board shall be exclusive.

We submit that in a suit for review brought by a private party the court clearly has the power and duty to enforce it if it upholds the validity of the Commission's order. While the paragraph providing for such review states that the court has jurisdiction to "affirm," set aside, or modify, it is clear that "affirm" here means enforce. The preceding paragraph providing for suits by the Commission for "enforcement" of its orders uses the same language. And the statute expressly declares

that in a private-party review proceeding the court shall have "the same jurisdiction" as in an "enforcement" proceeding by the Commission. Furthermore, the paragraph which follows the two paragraphs authorizing proceedings by the Commission and proceedings by private parties declares that in such proceedings the jurisdiction of the courts of appeals "to *enforce*, set aside, or modify" orders of the Commission shall be exclusive.

Cases arising under the enforcement provisions of the National Labor Relations Act confirm the conclusion that the court below erred in denying effectiveness to a valid order which Congress gave it the exclusive power to enforce. Section 10(e) of that Act (29 U.S.C. 160(e)), which was largely modeled on the provisions of the Federal Trade Commission Act,[3] states that the court of appeals "shall have power to grant * * * a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." The *power* thereby given to enforce orders found to be valid has been held to impose the *duty* to enforce such orders. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563. This Court there said (pp. 567, 568) that "the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree," and that the Act "does not require the Board to play hide-and-seek with those guilty of unfair labor

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[3] See Conference Report on National Labor Relations Act (H. Rep. No. 1371, 74th Cong., 1st Sess.), p. 5.

practices." See also *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 230; *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C.A. 2).

Here, also, the court, having power to enforce, had the duty to enforce, irrespective of compliance or non-compliance with the Commission's order by the party to whom the commands were directed.

Uniform judicial practice confirms the view that, in review proceedings brought by private parties under Section 11 of the Clayton Act, the power and duty to "affirm" is a power and duty to enforce. In such cases the courts, to the extent that they have found the Commission's orders valid, have regularly commanded obedience thereto.[4] En-

[4] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 730; *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 760; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (C.A. 1); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1); *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2); *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 380 (C.A. 2); *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 678 (C.A. 3); *Southgate Brokerage Co., Inc.* v. *Federal Trade Commission*, 150 F. 2d 607 (C.A. 4); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48, 54 (C.A. 4); *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 771 (C.A. 4); *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511, 520 (C.A. 6); *Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F. 2d 970, 980 (C.A. 7); *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 212, 221 (C.A. 7), affirmed, 324 U.S. 726; *The Q. R. S. Music Company* v. *Federal Trade Commission*, 12 F. 2d 730, 733 (C.A. 7); *Carter Carburetor Corporation* v. *Federal Trade Commission*, 112 F. 2d 722, 737 (C.A. 8).

There are contrary dicta in *Butterick Co.* v. *Federal Trade Commission*, 4 F. 2d 910, 913 (C.A. 2), certiorari denied, 267

forcement has been thus granted both by this Court and by the courts of appeals in all circuits in which the issue has been presented. And although this settled practice has generally not been discussed in the opinions, the cases which support it are, as Judge Clark stated in the court below, "too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate" (R. 178).

In cases instituted by the Commission under Section 11, it has been held that, because of the initial "if" clause in the paragraph authorizing such proceedings, non-compliance with the order is a prerequisite to enforcement. See *Federal Trade Commission* v. *Jack Herzog & Co.*, 150 F. 2d 450 (C.A. 2); *Federal Trade Commission* v. *Baltimore Paint & Color Works, Inc.*, 41 F. 2d 474 (C.A. 4); *Federal Trade Commission* v. *Morrissey*, 47 F. 2d 101 (C.A. 7).[5] But there is rational basis for im-

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U.S. 602, and *Federal Trade Commission* v. *Fairyfoot Products Co.*, 94 F. 2d 844, 846 (C.A. 7), and an early decision contrary to the usual practice in *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752 (C.A. 6). But *cf. Bear Mill Mfg. Co., Inc.* v. *Federal Trade Commission*, 98 F. 2d 67, 68 (C.A. 2) and *L. & C. Mayers Co., Inc.* v. *Federal Trade Commission*, 97 F. 2d 365, 367 (C.A. 2).

The cases upon which the court below relied (*Federal Trade Commission* v. *Herzog*, 150 F. 2d 450 (C.A. 2); *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (C.A. 2), certiorari denied, 277 U.S. 598; *Federal Trade Commission* v. *Standard Brands*, 189 F. 2d 510 (C.A. 2)), are all cases in which the judicial proceedings were initiated by Commission application for enforcement.

[5] While the cases have treated the question of non-compliance as judicially reviewable, it is doubtful whether the matter should be so regarded. The closely comparable provision in Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)

position by Congress of this limitation when the Commission applies for enforcement, without imposing a like limitation when those against whom cease and desist orders have been issued apply for judicial review.

Congress may well have believed that, unless there was some evidence of disobedience, the Commission had no occasion to go to the courts for enforcement of its orders. If the Commission took its orders to court even though there had been no indication of disobedience, the judiciary might be seriously and unnecessarily burdened. But the situation is altogether different where a private party, desirous of continuing the practice found illegal, elects to contest the order, and by that act compels the court to exercise its reviewing powers. If on such review the order is held to be valid, there is no reason to withhold judicial enforcement. Not to enforce means that, although a live controversy between the Commission and the party ordered to cease and desist has been judicially determined in the Commission's favor, the private party is nonetheless left free to flout the order which the court has upheld. For one thing, such a result detracts from the dignity of the courts.[6] And Congress,

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authorizing the Commission to issue a complaint if it has "reason to believe" that a person is violating the law, has been held non-reviewable. *Hills Brothers* v. *Federal Trade Commission*, 9 F. 2d 481, 483-4 (C.A. 9), certiorari denied, 270 U.S. 662.

[6] Judge Clark observed in this connection: "A court even moderately jealous of its own dignity might well gag at overlooking planned violation of its own order of affirmance merely because the latter lacked the two mystic words: 'Enforcement granted'" (R. 179).

which declared that disputed Commission orders should receive "speediest settlement" (*supra*, pp. 7-8) and that judicial proceedings involving such orders should take precedence over other cases (*supra*, p. 8), certainly did not intend that the court's approval of an order should be sterile, that it should have no more standing than a purely advisory opinion, and that its effectiveness should be made to depend upon the initiation of still further proceedings.

We submit that the question of enforcement turns on the court's powers and duties when a proceeding is brought under the paragraph of Section 11 authorizing private parties to obtain judicial review of Commission orders. We further submit that the court below decided the question of enforcement, not on this basis, but on the basis of its powers and duties when a proceeding is brought under the paragraph authorizing the Commission to apply to the courts for enforcement of its orders. The court below referred to the fact that the Commission had requested it to treat the prayer for enforcement, made at the close of the Commission's brief, as a cross-petition for enforcement (R. 177). The court denied enforcement because it concluded that the condition (non-compliance), applicable when the Commission initiates the proceeding, is equally a condition when it files a cross-petition for enforcement. The only authorities which the court cited were cases in which the Commission had initiated the proceeding (see note 4, *supra*, p. 12).

The court below also stated that there was "uncontradicted evidence" that the respondent had abandoned the practices prohibited by the Commission's order (R. 177). Since the court's duty to enforce was not conditional upon respondent's noncompliance with the Commission's order, the court's statement, even if correct, is immaterial. We also point out that a proceeding under Section 11 of the Clayton Act is not rendered moot by reason of abandonment of the practices prohibited by the Commission's order. *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257.[7] In addition, the Government disputes the accuracy of the statement as to what the record shows with respect to abandonment.

At the evidentiary hearing in 1946[8] respondent sought to justify its challenged discount practices, and it made no contention that these practices had been discontinued. This claim was first advanced in respondent's petition for rehearing, filed with the court below on June 19, 1951. It was there stated, without a single record reference, that "it appears from the record" that when the case was tried in 1946 respondent's discriminations had ceased (R. 163).

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[7] It is well settled that an order issued by the Commission under the Federal Trade Commission Act will be enforced even though the practices thereby prohibited had been discontinued prior to issuance of the Commission's order. See *Galter* v. *Federal Trade Commission*, 186 F. 2d 810 (C.A. 7), certiorari denied, October 8, 1951 (No. 93, this Term), and cases cited in Government's brief in opposition to certiorari in the *Galter* case, note 4, pp. 6-7.

[8] No evidence was taken after 1946, although the record was not formally closed until June 7, 1948 (R. 11, 96).

The specific violations which the Commission found related to the year 1941, but the Commission was under no obligation to multiply its proof by introducing evidence of continued violations of the kind shown by its evidence. Furthermore, the testimony of respondent's sales manager clearly indicates that at that time respondent had not abandoned its discount practices.[9] And Judge Clark, who wrote the court's opinion upholding the validity of the Commission's order (R. 153), stated in his dissent from the court's ruling on rehearing that, although in his view abandonment was not "in any way determinative" of enforcement, he believed that the majority was "seriously in error" in stating that there was uncontradicted evidence of abandonment (R. 179).

2. Under the ruling by the court below, in many instances there would have to be four separate proceedings before a party guilty of price discrimination or other violation of the Clayton Act could be brought to book: (1) an administrative proceeding heard on complaint of the Commission; (2) a proceeding before the court of appeals on petition to review; (3) a further proceeding before the court to obtain an enforcement order; and (4) a contempt proceeding. Section 2, as amended by the Robinson-Patman Act, is the basis for numerous Commission proceedings and orders of broad economic significance. Moreover, the ruling below equally applies to proceedings to review orders is-

[9] R. 11-42, 71-74, especially R. 13, 17-20, 23, 28, 32-33, 73.

sued by the Commission under the other sections of the Clayton Act which it is authorized to enforce (Sections 3, 7 and 8, 15 U.S.C. 14, 18, 19).

We submit that the decision below is in direct conflict with decisions both of this Court and of courts of appeals in other circuits directing enforcement of orders of the Commission whose validity had been upheld in review proceedings instituted by private parties under Section 11 of the Clayton Act. But if the Court should view the conflict of decision as somewhat muted because of the paucity of judicial discussion of the question of enforcement in the cases granting enforcement, then the case presents an important question of federal law which has not been, but should be, settled by this Court. Successful enforcement of the Clayton Act depends in large measure upon the promptness with which its prohibitions are enforced, and the decision below seriously militates against effective application of the Act.

CONCLUSION

The decision on rehearing below is in conflict with principles established in applicable decisions of this Court and other courts of appeals, and involves an important question of federal law. It is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1951.

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